

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
May 12, 2004 Session

**TODD SCHOTT v. ANIMAGIC STUDIOS, LLC**

**Appeal from the Chancery Court for Knox County  
No. 156664-3 Sharon Bell, Chancellor**

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**No. E2003-02287-COA-R3-CV - FILED AUGUST 16, 2004**

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Todd Schott ("Plaintiff") filed this lawsuit pursuant to Tenn. Code Ann. § 48-245-801 claiming he was a member of Animagic Studios, LLC ("the LLC"), and also that the LLC owed him over \$27,000 in unpaid salary and commissions. Plaintiff requested the Trial Court to appoint a Receiver and to direct the Receiver to liquidate the assets of the LLC for the benefit of the LLC's creditors and otherwise dissolve the LLC. After a trial, the Trial Court concluded Plaintiff was neither a creditor nor a member of the LLC and, therefore, could not maintain this lawsuit against the LLC pursuant to Tenn. Code Ann. § 48-245-801. Plaintiff appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and HOWELL N. PEOPLES, SP. J., joined.

Raymond E. Lacy and Cynthia Lacy Wagner, Knoxville, Tennessee, for the Appellant Todd Schott.

Robert S. Holland, Knoxville, Tennessee, for the Appellee Animagic Studios, LLC.

## OPINION

### Background

This lawsuit involves Plaintiff's claims that he is a member of the LLC and that he is owed back wages and commissions by the LLC. Plaintiff filed this lawsuit in December of 2002 requesting the Trial Court to appoint a Receiver for the LLC and to issue a temporary restraining order prohibiting the LLC from disposing of its assets, including certain copyrighted material. Plaintiff claimed the LLC had been administratively dissolved by the Tennessee Secretary of State in February of 2001 and that the LLC's Manager, Hani Gharbieh ("Gharbieh"), failed or refused to reinstate the LLC's articles of incorporation. Plaintiff maintained that because he was a creditor of the LLC, he was authorized by statute "to apply to this Court for entry of an order appointing a Receiver for [the LLC] and directing the Receiver to wind up and liquidate" the LLC. Plaintiff sought in excess of \$27,000 from the LLC "and others for salary and compensation." Plaintiff requested certain assets of the LLC, including the copyrighted materials, be sold for the benefit of Plaintiff and the LLC creditors.

The Trial Court entered an *ex parte* temporary restraining order prohibiting the LLC from selling, using, or encumbering, etc., the copyrighted materials identified by Plaintiff in the complaint. Approximately one month after the temporary restraining order was issued and after a hearing was conducted, the Trial Court converted the temporary restraining order into a temporary injunction pending entry of a final judgment.

The LLC filed a motion for joinder of parties seeking to add two defendants to the lawsuit. The LLC sought to add Gharbieh in his individual capacity as well as a company called Global Connections Call Center, Inc. ("Global Connections"). According to this motion, Gharbieh and the "now-defunct" Global Connections were necessary parties for a just and complete adjudication of Plaintiff's claims because Global Connections was the entity that employed Plaintiff to perform the work creating the material that eventually was copyrighted by the LLC. The LLC, Gharbieh, and Global Connections then filed a counterclaim asserting that Plaintiff was in possession of approximately \$25,000 worth of computer equipment purchased by Gharbieh during Plaintiff's employment with Global Connections. It also was alleged in the counterclaim that Plaintiff had failed to complete a major project for Global Connections, and that Plaintiff, instead, had completed a project for a competitor of the LLC and Global Connections while being paid by Global Connections. Based on procedural irregularities not pertinent to this appeal, the Trial Court entered an order denying the LLC's motion to join additional parties and the counterclaim was withdrawn voluntarily. This case proceeded to trial on May 9, 2003, on the claims contained within the complaint.

Plaintiff testified he is an animator and has a bachelors degree in graphic design from the University of Florida. Plaintiff met Gharbieh through a mutual friend, Keith Presley ("Presley"), who informed Plaintiff that Gharbieh was interested in creating an animated Sinbad movie. According to Plaintiff, it was decided after some initial discussions that Plaintiff, Gharbieh, and

Presley would be equal one-third partners with Presley handling the 3-D animation, Gharbieh handling the marketing and financing, and Plaintiff handling the 2-D animation and graphics. Plaintiff testified he thereafter had several meetings with Gharbieh at which they discussed becoming partners in a company which would be established for the sole purpose of creating the animated Sinbad movie. Plaintiff testified that Presley eventually backed out of the negotiations. After Presley was no longer involved, it was Plaintiff's understanding that he would be equal partners with Gharbieh, i.e., 50-50. However, several months later Plaintiff was presented with a proposal for his having only a ten percent ownership interest in the LLC, a proposal he characterized as a "slap in the face." Plaintiff claimed it was his understanding that his compensation "would be in a salary form and that I would be working at a reduced rate ... [and] that I would have this ownership in the company."

Plaintiff identified a document titled Agreement in Principal which he entered into with Gharbieh in November of 1999. This document provided that membership interests in the LLC would be "30% to [Plaintiff], 15% to Fadi Gharbieh<sup>1</sup>, 4% to Global Connections and 51% to Hani Gharbieh." The document further stated that a final and complete agreement would be entered into within sixty days, if such an agreement could be reached by all of the parties. If such a final and complete agreement could not be reached, the Agreement in Principal provided it would be null and void after sixty days. Plaintiff testified that the Agreement in Principal was presented to him after he had rejected the proposed ten percent ownership interest. Specifically, Plaintiff stated that after he was presented the offer of a ten percent ownership interest:

Mr. Gharbieh and I had met the following week, and we had a pretty heated debate ... [and] I told him that our verbal agreement had been equal partners, 50 percent. He said he did not believe that, that he had only intended 10 percent. And we basically went round and round until we met at 30 percent.

Plaintiff acknowledged that the Agreement in Principal was intended to be temporary. Plaintiff stated it was his understanding that he would be presented with a final document before the Agreement in Principal expired and would receive a 30% ownership interest. In addition, once the Sinbad movie was sold, his salary would be increased. Plaintiff claimed he never was presented with any further agreements before or after the Agreement in Principal expired in sixty days according to its own terms.

Plaintiff testified that he received his paychecks from Global Connections and it was his understanding that Global Connections would be "involved" in the project. Even though Plaintiff was paid by Global Connections, he nevertheless claimed it was the LLC which was obligated to pay his salary. Plaintiff admitted he never received any money or paychecks from the LLC. According to Plaintiff, Gharbieh was responsible for paying rent and related bills but on several occasions Plaintiff ended up having to make these payments. Plaintiff stated he began to receive his paychecks

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<sup>1</sup>Fadi Gharbieh is the younger brother of Hani Gharbieh.

in an erratic fashion during 2001, and that he was owed a total of \$27,819 in past-due salary and commissions. With regard to the fate of the Sinbad movie, Plaintiff testified the project was now dormant because a competitor of the LLC was set to release an animated Sinbad movie in the very near future.

On cross-examination, Plaintiff identified nine checks he received from Global Connections in 2001 which totaled \$23,167.63. Plaintiff acknowledged he was paid an additional \$8,750 that year. Plaintiff admitted the only signed document giving him any ownership interest in the LLC was the Agreement in Principal which expired according to its own terms after sixty days. Plaintiff also was questioned about the rent and phone payments he claimed to have made on behalf of the LLC. Plaintiff identified a rent check from June of 2001 which was drawn on the account of Global Connections.<sup>2</sup> Plaintiff also acknowledged that the telephone account was established by Global Connections and the bill was sent to Global Connections, not the LLC. However, the listing in the phone book was for Animagic Studios.

The next witness was Gharbieh, who testified he never had any agreement with Plaintiff for the ownership interest in the LLC to be split 50-50 between them. Gharbieh stated Plaintiff was hired by Global Connections, a separate company from the LLC. After Plaintiff began his employment with Global Connections, Gharbieh offered him a ten percent ownership interest in the LLC for the sole purpose of making Plaintiff more dedicated to the project and giving him incentive. However, when Plaintiff was presented with the proposal giving him a ten percent ownership interest in the LLC, he refused to sign it because he wanted more.

Gharbieh testified to the interrelationship between Global Connections and the LLC. Specifically, there was an agreement between Global Connections and the LLC wherein Global Connections would have a five percent interest in the Sinbad movie and, in return, Global Connections would develop the project and make it feasible. Gharbieh stated:

[Plaintiff] is employed by Global Connections to develop that idea [of creating a Sinbad movie] based on the contract between Global Connections and [the LLC]. He had been hired by Global Connections to fulfill that part of the agreement that they have with [the LLC].

Gharbieh testified he is the only member of the LLC. He further stated that after the Agreement in Principal was signed, Plaintiff wanted more than a thirty percent ownership interest in the LLC and none of the other parties would agree to that. According to Gharbieh, Plaintiff then went to his attorney who drew up a proposed contract which took almost everything from Gharbieh, “[a]nd that’s why we couldn’t agree with his agreement.”

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<sup>2</sup> The Global Connections rent check was not admitted to challenge Plaintiff’s claim that he made two rent payments. Rather, it was admitted to show that the rent payments, when made, were paid by Global Connections as opposed to the LLC.

Gharbieh testified that he sent Plaintiff a letter in April of 2001 informing Plaintiff that his employment with Global Connections was being terminated and any further work performed by Plaintiff would be done as an outside contractor. Plaintiff, however, denied ever receiving this letter. According to Gharbieh, Plaintiff was paid in full for the work he performed for Global Connections.

In September of 2003, the Trial Court issued its Final Order and dissolved the temporary restraining order. The Trial Court held that Tenn. Code Ann. § 48-245-801 requires a person filing a lawsuit seeking dissolution of a limited liability company to be either a creditor or a member of the limited liability company, and the Trial Court found Plaintiff to be neither. The Trial Court stated “Plaintiff was not a member or creditor of the LLC as there was no agreement about the essential terms.” Because Plaintiff was neither a creditor nor a member of the LLC, the Trial Court further concluded that he could not seek the appointment of a Receiver or dissolution of the LLC. The Trial Court further noted that Plaintiff “could have protected himself with a contract but failed to do so.” After making these findings, the complaint was dismissed. At issue on this appeal is whether the Trial Court erred in its decision that Plaintiff was neither a creditor nor a member of the LLC and, therefore, was unable to seek dissolution of the LLC pursuant to Tenn. Code Ann. § 48-245-801.

### **Discussion**

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Tenn. Code Ann. § 48-245-801 provides as follows:

**Supervised winding up and termination following a nonjudicial dissolution.** – After an event of dissolution has occurred and before a certificate of termination has been issued, the LLC or, for good cause shown, *a member or creditor* may apply to a court within the county in which the registered office of the LLC is situated to have the dissolution conducted or continued under the supervision of the court as provided in §§ 48-245-901–48-245-904. (emphasis added).

The procedure for judicial dissolution of a limited liability company is found in Tenn. Code Ann. § 48-245-903. As relevant to this appeal, subsection (c) of this statutory section provides:

(c) INJUNCTIONS. A court in a proceeding brought to dissolve an LLC may issue injunctions, appoint a receiver or custodian pendente

lite with all powers and duties the court directs, take other action required to preserve the LLC's assets wherever located, and carry on the business of the LLC until a full hearing can be held.

Tenn. Code Ann. § 48-245-903(c).

The Tennessee Limited Liability Company Act (“the Act”) is found at Tenn. Code Ann. § 48-201-101 through § 48-248-606. Many terms are defined in Tenn. Code Ann. § 48-202-101 and these definitions apply throughout the Act. The term “Member” is defined as a “person reflected in the required records of an LLC as the owner of some governance rights of a membership interest of the LLC.” § 48-202-101(25). Relying on this definition, the LLC argues that Plaintiff cannot be considered a member of the LLC because he is not reflected in the required records as an owner. Plaintiff, on the other hand, argues that the Trial Court had the power to grant any equitable relief it deemed just according to Tenn. Code Ann. § 48-245-901, and that equity demands that he be considered a member holding “not less than a 30% interest in Animagic.”<sup>3</sup>

We will assume for present purposes only that the Trial Court had the equitable power to award Plaintiff an ownership interest in the LLC, notwithstanding the fact that Plaintiff is not reflected in the required records as an owner. The Trial Court certainly was presented with conflicting testimony regarding Plaintiff’s potential or actual ownership interests in the LLC. Plaintiff testified: 1) at first he was promised a 50% ownership interest in the LLC; 2) he was later presented with an offer of a 10% interest; 3) he and Gharbieh entered into a sixty day temporary agreement wherein Plaintiff was to have a 30% interest; 4) Plaintiff was not offered an ownership interest after the temporary agreement expired; and 5) he expected to be presented with a final agreement giving him at least a 30% interest. Gharbieh testified: 1) he never agreed that Plaintiff would have a 50% interest; 2) he offered Plaintiff a 10% interest for the sole purpose of giving Plaintiff incentive on the Sinbad project; 3) Plaintiff rejected the 10% offer because he wanted more; 4) he and Plaintiff entered into a sixty day temporary agreement wherein Plaintiff was to have a 30% interest; 5) Plaintiff consulted an attorney and presented Gharbieh with a proposed agreement which took almost everything from Gharbieh; and 6) he and Plaintiff were unable to reach any final agreement.

In assessing this conflicting testimony, the Trial Court had the opportunity to assess the credibility of Plaintiff and Gharbieh, as well as any biases each particular witness may have had. “Unlike this Court, the trial court observed the manner and demeanor of the witnesses and was in the best position to evaluate their credibility.” *Union Planters Nat’l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). A trial court’s determinations regarding credibility

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<sup>3</sup> Tenn. Code Ann. § 48-245-901 provides that a “court may grant any equitable relief it considers just and reasonable in the circumstances or may dissolve an LLC and/or direct that the dissolved entity be merged into another or new LLC or other entity on the terms and conditions the court deems equitable.”

are accorded deference by this Court. *Id.*; *Davis v. Liberty Mutual Ins. Co.*, 38 S.W.3d 560, 563 (Tenn. 2001).

In the present case, the credibility of the only two witnesses obviously impacted the Trial Court's conclusion when it stated there was “no agreement about the essential terms.” The amount of Plaintiff’s ownership interest unquestionably would constitute an “essential term” of any oral contract between Plaintiff and Gharbieh on this point. While oral contracts, with some exceptions not applicable here, are enforceable, persons seeking to enforce them must demonstrate that the parties mutually assented to the terms of the contract and that these terms are sufficiently definite to be enforceable. *See, e.g., Burton v. Warren Farmers Cooperative*, 129 S.W.3d 513, 521 (Tenn. Ct. App. 2002). The Trial Court found Plaintiff and Gharbieh never reached any agreement on the amount of Plaintiff’s ownership interest in the LLC and, without an agreement on this essential term, any claim based on an oral contract must fail. We conclude the evidence does not preponderate against the Trial Court’s findings and resulting conclusion that there was no enforceable agreement between Plaintiff and Gharbieh regarding Plaintiff having an ownership interest in the LLC. Therefore, we find no error in the Trial Court’s decision that Plaintiff is not a “member” of the LLC for purposes of Tenn. Code Ann. § 48-245-801.

The next issue is whether the Trial Court erred in reaching its decision that Plaintiff is not a creditor of the LLC. The facts are undisputed that Plaintiff never received any paychecks or compensation from the LLC. Plaintiff identified over \$23,000 in checks he received from Global Connections for salary and commissions payments. Nevertheless, Plaintiff claimed it was the LLC and not Global Connections who had the obligation to pay his salary and commissions and reimburse him for expenses. Plaintiff offered no additional proof to support this conclusion.

Gharbieh testified Plaintiff was an employee of Global Connections. Gharbieh’s testimony was substantiated by paychecks which had been cashed by Plaintiff and drawn on the bank account of Global Connections. It is important to note that the Trial Court never made a finding regarding whether Plaintiff actually was owed back wages or commissions by some entity other than the LLC because it did not need to resolve that particular issue once it found Plaintiff was not a creditor of the LLC. When concluding Plaintiff was not a creditor of the LLC, the Trial Court essentially found that if Plaintiff was owed any back wages or commissions, it was not the LLC which was responsible for this debt. We conclude the evidence does not preponderate against the Trial Court’s findings and resulting conclusion that Plaintiff was not a creditor of the LLC.

Having affirmed the Trial Court’s decision that Plaintiff was neither a creditor nor a member of the LLC, we likewise must affirm its conclusion that Plaintiff was not authorized to petition to Trial Court to appoint a Receiver or to judicially dissolve the LLC pursuant to Tenn. Code Ann. § 48-245-801.

### **Conclusion**

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are assessed against the Appellant Todd Schott and his surety.

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D. MICHAEL SWINEY, JUDGE